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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2032

MARK STARLING,

Petitioner,

versus

WILLIAM E. BEARD, JR.,
and through his next friend and father,
WILLIAM E. BEARD, SR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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WILLIAM E. BEARD, JR.,
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WILLIAM E. BEARD, SR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays for the issuance of a writ of certiorari to review the decision of the United States Court of Appeals, Fifth Circuit, entered on March 26, 1980 denying petitioner's Motion for a Rehearing En Banc and thereby adhering to the panel decision of February 29, 1980, in summary calendar Case No. 79-2778, unpublished, styled William E. Beard, Jr., and

through his next friend and father William E. Beard, Sr., Plaintiff-Appellant, versus M. Starling, Defendant-Appellee, on appeal from the United States District Court for the Middle District of Georgia, which in Civil Action No. 78-193, Columbus Division, entered its decision on June 18, 1979, dismissing the Plaintiff's complaint on Defendant's Motion for a Judgment on the Pleadings, a case also unpublished.

OPINIONS BELOW

The decisions of the Court of Appeals and the District Court as well as the appropriate judgments entered in conjunction therewith are appended to this petition in Appendix "A".

JURISDICTION

The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment or decree of the Court of Appeals by writ of certiorari is 28 U.S.C. §1254(1) (62 Stat. 928).

QUESTIONS PRESENTED FOR REVIEW

1.

Does a complaint state a cause of action under 42 U.S.C. §1983 when it is predicated solely on a scuffle between the Plaintiff and the Defendant which occurred subsequent to a valid arrest of the Plaintiff by Defendant? No.

2.

Does 42 U.S.C. §1983 confer jurisdiction on a U.S. District Court for a claim amounting simply to an assault and battery cognizable under state tort law when the Plaintiff himself alleges that the incident out of which the claim arises amounts to assault and battery, and when the Plaintiff fails to invoke any constitutional provision except the alleged right to be free from physical abuse, coercion, and intimidation allegedly secured by the due process clause of the 14th Amendment? No.

3.

Is such a claim too nebulous to rise to the constitutional proportions necessary for federal jurisdiction? Yes.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The case involves the following constitutional provision and statutes, all of which are set out verbatim in Appendix "B":

Section 1 of the Fourteenth Amendment to the United States Constitution

42 U.S.C. §1983 (R.S. §1979)

28 U.S.C. §1343(3)

STATEMENT OF THE CASE

The factual background for the issues in this case will be found in both the opinions of the District Court and of the Court of Appeals, and these facts are highlighted below:

1.

William Beard, Jr., was stopped by Officer Mark Starling of the Columbus, Georgia Police Department for a traffic violation and during the course of questioning subsequent to this arrest a scuffle ensued and blows were exchanged between the Plaintiff and Defendant.

2.

Plaintiff brought a damage action under 42 U.S.C. §1983 claiming assault and battery which he alleged to constitute a denial of his due process rights under the Fourteenth Amendment of the United States Constitution.

3.

Plaintiff's attorney, apparently aware of the rule in *Clements v. State*, 226 Ga. 66, 67, 172 S.E.2d 600, 601 (1970), that an arrest is accomplished whenever the liberty of another is restrained no matter how slight that restraint might be and that an arrest is complete from the moment that police officers cause a person to alight from an automobile which they have been driving,

made no allegation that the police officer's alleged conduct was designed in any manner to bring about the arrest and made no reference and invoked in no way whatsoever the Fourth Amendment of the Constitution of the United States so as to suggest that the alleged misconduct constituted some sort of illegal search and seizure, nor was any other provision of the Constitution other than the Due Process Clause of the Fourteenth Amendment invoked.

4.

The District Court granted the Defendant's Motion for a Judgment on the Pleadings on the theory that the Complaint made no claim for illegal arrest, but stated simply an assault and battery claim which under the Due Process Clause was too nebulous to rise to constitutional proportions.

5.

The Court of Appeals, relying on *Hamilton v. Chaffin*, 506 F.2d 904 (5th Circuit 1975) and discarding *Paul v. Davis*, 424 U.S. 693 (1976), and *Baker v. McCollan*, 99 S.Ct. 2689 (1979), reversed the District Court with the observation that the allegation of excessive force constituted a violation of due process.

REASONS FOR THE ALLOWANCE OF THE WRIT

A. The Court of Appeals has decided federal questions in a way in conflict with the applicable decisions of the Supreme Court and these are important questions of federal law which should be settled by the Supreme Court.

1.

Paul v. Davis, 424 U.S. 693 (1976) requires that this assault and battery claim be dismissed because it constitutes only a tort action under state law.

The implications of *Paul v. Davis* for the case at bar are obvious. There the plaintiff alleged a classical claim for defamation, but he brought it under 42 U.S.C. §1983 instead of Kentucky law, and the Supreme Court concluded that he failed to set out a due process claim. The Court at pages 698 and 699 discusses the implications of allowing a §1983 claim:

> "If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under §1983. And since it is surely far more clear from the language of the Fourteenth

> Amendment that 'life' is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under §1983.
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent."

We note that this discussion presumes that the Fourteenth Amendment more clearly protects life than injury to reputation. It should also be presumed that the Amendment more clearly protects life than injury to the person and that an assault and battery is thus less likely to rise to constitutional dimensions than a homicide. If the Supreme Court has not concluded that wrongful death actions are cognizable under civil

rights jurisdiction (See dissent of Justices White, Brennan, and Marshall in *Jones v. Hildebrant*, 432 U.S. 183, 189-191 (1977), which also cites various circuits for the proposition that physical abuses by police provide grounds for recovery under §1983, but which does not undertake an analysis of the fact that such claims are normally tied to specific guarantees in the Bill of Rights such as will be found in the Fourth or Eighth Amendments: at the very least this dissenting opinion shows how the case at bar presents some questions requiring review by certiorari), certainly the Court has not concluded that assault claims are so cognizable. For that matter everything said at pages 699, 700, and 701 of the opinion clearly indicates that neither homicide nor assault claims, standing alone, will receive the attention of the federal courts:

> "The first premise would be contrary to pronouncements in our cases on more than one occasion with respect to the scope of §1983 and of the Fourteenth Amendment.
>
> In the leading case of *Screws v. United States*, 325 U.S. 91 (1945), the Court considered the proper application of the criminal counterpart of §1983, likewise intended by Congress to enforce the guarantees of the Fourteenth Amendment. In his opinion for the Court plurality in that case, Mr. Justice Douglas observed:

> 'Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.' 325 U.S., at 108-109.

After recognizing that Congress' power to make criminal conduct of state officials under the aegis of the Fourteenth Amendment was not unlimited because that Amendment 'did not alter the basic relations between the States and the national government,' the plurality opinion observed that Congress should not be understood to have attempted

> 'to make all torts of state officials federal crimes. It brought within [the criminal provision] only specified acts done 'under color' of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States.' *Id.*, at 109.

This understanding of the limited effect of the Fourteenth Amendment was not lost in the Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961). There the Court was careful to point out that the complaint stated a cause of action under the Fourteenth Amendment be-

> cause it alleged an unreasonable search and seizure violative of the guarantee 'contained in the Fourth Amendment.' *Id.*, at 171. Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded. Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprior vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the 'constitutional shoals' that confront any rights statutes a body of general federal tort law, *Griffin v. Breckenridge*, 403 U.S. 88, 101-102 (1971); *a fortiorari*, the procedural guarantees of the Due Process Clause cannot be the source for such law."

It is interesting to note that the *Griffin* opinion, in discussing 42 U.S.C. §1985(3) immediately prior to the quote on "constitutional shoals," makes the following observation:

> "For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish

an assault and battery when committed by two or more persons within a State'."

2.

Baker v. McCollan, ____ U.S. ____ (June 26, 1979), 99 S.Ct. 2689, makes dismissal of this post-arrest claim even more imperative because there is no distinction between a false imprisonment action arising because of alleged constitutional wrongs committed after a valid arrest and an assault and battery claim which also arises after an arrest, the validity of which the plaintiff himself does not challenge.

Clements v. State, 226 Ga. 66, 67, 172 S.E.2d 600, 601 (1970) defines arrest as follows:

"An arrest is accomplished whenever the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be. The defendant may voluntarily submit to being considered under arrest without any actual touching or show of force, and the arrest is complete. [Cits.] The mere fact that the officer testifying with regard to these occurrences stated at one place in his testimony that after he had completed the search he 'then placed him under arrest' does not alter the fact that the defendant was actually under arrest from the moment the police officers approached the automobile which he was driving and caused him to alight therefrom. . . ."

An arrest having been accomplished by Officer Starling, the facts and law of *Baker v. McCollan* are particu-

larly relevant and we quote from pages 4, 6, 7, 8, and 9 (footnotes omitted) of the slip opinion without any further comment:

> "Respondent brought this damages action 'pursuant to the Fourteenth Amendment to the United States Constitution and . . . §1983.' App. 6. After each party had rested his case, the United States District Court for the Northern District of Texas directed a verdict in favor of Sheriff Baker and his surety, Transamerica Insurance Company, without articulating its reasons. The Court of Appeals for the Fifth Circuit reversed. Characterizing the respondent's cause of action as a '§1983 false imprisonment action,' the Court of Appeals determined that respondent had made out a prima facie case by showing (1) intent to confine, (2) acts resulting in confinement, and (3) consciousness of the victim of confinement or resulting harm. The question in the court's view thus became whether Sheriff Baker was entitled to the defense of qualified immunity, which in turn depended on the reasonableness of his failure to institute an identification procedure that would have disclosed the error. Noting that the error would have been discovered if Potter County officials had sent identifying material to Dallas or had immediately upon respondent's arrival in Amarillo compared him with the file photograph and fingerprints of the wanted

man, the Court of Appeals determined that a jury could reasonably conclude that the Sheriff had behaved unreasonably in failing to institute such measures. Accordingly, the case was remanded to the District Court for a new trial."

* * *

"In this case respondent was arrested pursuant to a facially valid warrant, and the Court of Appeals made no suggestion that respondent's arrest was constitutionally deficient. Indeed, respondent makes clear that his §1983 claim was based solely on Sheriff Baker's actions after respondent was incarcerated:"

> 'McCollan's §1983 claim against the sheriff is not for the wrong name being placed in the warrant or the failure to discover and change same or even the initial arrest of the respondent, but rather for the intentional failure to investigate and determine that the wrong man was imprisoned.' Brief for Respondent, at 12.

* * *

"Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all jurisdictions, is largely irrelevant to his claim of deprivation of liberty without due process of law.[4] The Constitution does not guarantee that only the guilty will be arrested. If it did,

§1983 would provide a cause of action for every defendant acquitted — indeed, for every suspect released. Nor are the manifold procedural protections afforded criminal defendants under the Bill of Rights 'without limits.' *Patterson v. New York*, 432 U.S. 197, 208 (1977). 'Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' *Ibid.*"

* * *

"The Court of Appeals closed its opinion with the following summary of its holding:"

> 'We are saying that the sheriff or arresting officer has a duty to exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant and not merely someone of the same or similar name. *See* Restatement (2d) of Torts §125, Comment (d)(1965).' Petn., at A-7.

"Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as '[m]edical malpractice does not become a constitutional violation merely because the victim is a

prisoner,' *Estelle v. Gamble*, 429 U.S. 97, 106 (1978), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official."

"Having been deprived of no rights secured under the United States Constitution, respondent had no claim cognizable under §1983. The judgment of the Court of Appeals for the Fifth Circuit is therefore

Reversed."

3.

The Court of Appeals overlooked *Bishop v. Wood*, 426 U.S. 341, 349 (1976), where the Supreme Court concluded that the Due Process Clause of the Fourteenth Amendment is not a guarantee against ill-advised personnel decisions and where the Court in Footnote 13 suggested that some of the allegations that false reasons were given for the petitioner's discharge would be matters for a state law claim.

4.

The Court of Appeals overlooked the analogous case of *Stone v. Powell*, 428 U.S. 465, 481, 482, 494 (1976), where the Court held that habeas corpus relief is not available in those cases in which the state has provided opportunity for full and fair litigation of a Fourth Amendment claim and where footnote 35 makes certain remarks in the Fourth Amendment context which are equally appropriate to the context of the present case involving a common law claim for assault and bat-

tery for which the Plaintiff could find relief under the laws of Georgia:

> "State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-344 (1816). Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems."

5.

The Court of Appeals overlooked *Ingraham v. Wright*, 430 U.S. 651(2) (1977): "The Due Process Clause of the Fourteenth Amendment does not require notice and hearing prior to imposition of corporal punishment as that practice is authorized and limited by the common law."

The opinion beginning at page 672 and ending at page 682 discusses and emphasizes in great detail the consideration of the availability of a common law remedy so as to preclude a plaintiff from obtaining relief under the Due Process Clause of the Fourteenth Amendment. If the availability of a common law remedy for the corporal punishment of school children is considered significant in precluding the exercise of federal jurisdiction, then we see no reason why the availability of a common law remedy for a tort such as assault

and battery should not also result in the dismissal of a federal complaint predicated on the Due Process Clause. When the Supreme Court in *Ingraham* affirmed the Fifth Circuit Court of Appeals in *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976), it affirmed an opinion of that Court sitting en banc which also gave attention to the availability of state remedies as a ground for denying federal jurisdiction. On page 917 of the en banc opinion we see the following observation upon consideration of the substantive due process issue: "We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child." Also on page 917 of the opinion we see this observation as to the procedural due process issue: "We do not believe that infliction of a paddling subjects a schoolchild to a grievous loss for which the Fourteenth Amendment due process standards should be applied." The fact that the Plaintiff in the case at bar has alleged physical injuries does not make the present case any different from *Ingraham* because in that case each of the plaintiffs alleged physical injuries which required medical attention.

B. The Court of Appeals has rendered a decision in conflict with the decisions of other courts of appeal on the same matter.

1.

United States, ex rel. Miller v. Twomey, Warden, 479 F.2d 701, 719 (7th Cir. 1973), in an opinion by Judge Stevens (promoted to Justice), rejects an Eighth Amendment

claim in part on the following rationale: "The assault committed by Bright was a common law tort; he did not violate §1983."

2.

Cole v. Smith, 344 F.2d 721(6) (8th Cir. 1965) rejects assault claims under §1983: "State prisoner could not maintain action in federal district court under Civil Rights Act against hospital aides at state security hospital, where prisoner had been under treatment, for alleged assaults by hospital aides."

3.

Wells v. Ward, 470 F.2d 1185, 1187 (10th Cir. 1972) appears reluctant to entertain assault and battery claims in federal courts:

> "The cases recognize that evaluations of rights and duties under §1983, *supra*, arising as they do under the Fourteenth Amendment to the Constitution of the United States, are often different from counterpart common law actions which arise under state substantive law. This is not to say that at times the same set of facts will not give rise to remedies under both §1983 and the state law of torts. The differences are though in terms of not only the requisite elements under §1983, but also in the gravity of the right which has been invaded. For example, under state common law, the mere placing of another in apprehension

of bodily harm is an assault and the mere unprivileged touching of another is a battery. Also, the slightest interference with personal liberty is a false imprisonment. It does not follow that all such invasions however trivial or frivolous serve to activate remedies under the due process clause of the Fourteenth Amendment as well as those parts of the Bill of Rights which are incorporated in and made a part of due process."

4.

The following circuits have applied *Paul v. Davis* in its more restricted sense — the state or common law tort of defamation alone does not deprive a plaintiff of a liberty interest cognizable by the Civil Rights Act or the Fourteenth Amendment:

(a) *Lyons v. Sullivan*, 602 F.2d 7(10) (1st Cir. 1979), *cert. den.*, 100 S.Ct. 159

(b) *Walker v. Cahalan*, 542 F.2d 681(1) (6th Cir. 1976), *cert. den.*, 430 U.S. 966

(c) *Webster v. Redmond*, 599 F.2d 793(4, 5) (7th Cir. 1979), *cert. den.*, 100 S.Ct. 712

(d) *Smith v. Klecker*, 554 F.2d 848 (8th Cir. 1977)

5.

The following circuits have applied *Paul v. Davis* in its more general sense — the Civil Rights Act and the

Fourteenth Amendment are not intended to be a general font of tort law or catch-all statutes for state law claims:

(a) *Sullivan v. Brown,* 544 F.2d 279 (6th Cir. 1976)

(b) *Bonner v. Coughlin,* 545 F.2d 565 (7th Cir. 1976) *cert. den.,* 435 U.S. 932

(c) *Havas v. Thornton,* 609 F.2d 372 (9th Cir. 1979) — case demonstrates distinction between a pure state tort claim and a claim apparently involving the Fourth Amendment, for the first paragraph and Footnote 3 of the opinion indicates that certain claims involving an illegal arrest were not dismissed and the publisher's syllabus 2 cites the Fourth Amendment as being in issue.

C. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings that it calls for supervision by the Supreme Court.

1.

The Court of Appeals in the present case misapprehended, misconstrued, and misapplied *Hamilton v. Chaffin,* 506 F.2d 904 (5th Cir. 1975) for the following reasons:

(a) As indicated by footnote 3 in that opinion which is found on page 907, the Plaintiff contended that the decedent's right to due process and freedom from cruel and unusual punishment were denied by the defendants' actions under color of state law and such an allegation is not involved in the case at bar, nor is there the invocation of any other federal constitutional right except the Due Process Clause. The Plaintiffs in the case at bar do not even invoke the Fourth Amendment because they apparently have conceded the validity of the initial arrest and they only are concerned with the scuffle itself which occurred subsequent to this arrest.

(b) The opinion recognizes on page 910 that a violation of a state created right does not reach constitutional proportions and it is insufficient to constitute a violation of a right cognizable under 42 U.S.C. §1983. As we indicated in the foregoing subparagraph, the Plaintiffs in the case at bar do not allege the violation of any specific constitutional right, but rather invoke the Due Process Clause on a claim which is essentially a state tort, which they themselves designate as assault and battery and which they themselves designate as a claim cognizable under the laws of the State of Georgia. The claim that this is a due process violation is purely redundant and completely

overlaps the essential nature of the action, that is as an assault and battery tort recognized by the Georgia law.

(c) If the Court considers *Hamilton v. Chaffin* indistinguishable and thus authority for the decision of the Court of Appeals in the case at bar, we respectfully suggest that the Court consider whether or not subsequent decisions of the Supreme Court of the United States have in fact by now brought into question the validity of the holding in *Hamilton v. Chaffin.*

2.

The Court of Appeals overlooked *Lyons v. Baker,* 180 F.2d 893 (5th Cir. 1950): "Complaint alleging that grand jury convened on behalf of the state of Florida, in order to harm, libel and injure the plaintiff, made false and malicious charges against him, was properly dismissed for want of federal jurisdiction."

3.

The Court of Appeals overlooked *Charlton v. City of Hialeah,* 188 F.2d 421, 423 (5th Cir. 1951): ". . . It was not intended by the 14th Amendment and the civil-rights statute that all matters formerly within the exclusive cognizance of the states should become matters of national concern. . . . Every illegal discrimination by a policeman on the beat would be state action for the purpose of suit in a federal court."

4.

The Court of Appeals overlooked *Yglesias v. Gulfstream Park Racing Association, Inc.*, 201 F.2d 817, 818 (5th Cir. 1953): ". . . Where the alleged claim under the Constitution or federal statutes clearly appears to be colorable, or made solely for the purpose of creating federal jurisdiction over what would otherwise be an action to vindicate a right arising only under state law, and no substantial facts establishing federal jurisdiction are alleged, mere conclusions asserting the violation of a constitutional right are insufficient."

5.

The Court of Appeals overlooked *Curry v. Ragan*, 257 F.2d 449, 450 (5th Cir. 1958), *cert. den.*, 358 U.S. 851 (1958): "Neither the Fourteenth Amendment nor the Civil Rights Acts purported to secure a person against unfounded or even malicious claims or suits in state courts, especially so when the laws and courts of the state are available and furnished adequate remedies to a person aggrieved."

6.

The Court of Appeals overlooked *Deloach v. Rogers*, 268 F.2d 928 (5th Cir. 1959): Action brought against sheriff and deputy only asserted claim "for false arrest and assault and battery and did not allege cause under Federal Civil Rights Act."

7.

The Court of Appeals overlooked *Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964): "Courts have been reluctant to allow what they consider simple state actions for false imprisonment and assault and battery to be brought in the federal courts as civil rights actions."

8.

The Court of Appeals overlooked *Dorsey v. NAACP*, 408 F.2d 1022, 1024 (5th Cir. 1969), *cert. den.*, 396 U.S. 847 (1969): "But it is axiomatic that these civil rights statutes of the post-bellum period were not intended to preempt state laws in their proper role of vindicating what are essentially state-guaranteed rights."

9.

The Court of Appeals overlooked *McDowell v. State of Texas*, 465 F.2d 1342, 1345, 1346 (5th Cir. 1971): General claim of lack of due process unaccompanied by more precise claim of a federal right violation does not create §1983 jurisdiction when only a state violation is involved.

10.

The Court of Appeals overlooked *Clemmons v. Greggs*, 509 F.2d 1338 (5th Cir. 1975): Prison ruckus between guards and inmates did not amount to civil rights case.

11.

The Court of Appeals overlooked *Miller v. Carson*, 563 F.2d 757, 760 (Footnote 7) (5th Cir. 1977): ". . . Violation of state law by a state official, without more, is not a violation of the federal right to procedural due process."

12.

The Court of Appeals overlooked *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187, 1189, 1190 (1978): "Section 1983 simply does not provide a remedy for mere common law torts, even though committed under color of state law."

13.

The Court of Appeals overlooked *Cook v. Houston Post*, 616 F.2d 791(6) (5th Cir. 1980): "Prosecuted persons' interest in reputation, false arrest, malicious prosecution, libel and slander were matters which state protects by virtue of tort law, providing forum for such interests by means of damage action, and plaintiffs, who had been unsuccessfully prosecuted, had been deprived of no rights secured under Constitution and thus had no claim cognizable under 1871 civil rights statute."

CONCLUSION

The foregoing authorities and the civil rights cases involving the use of force collected and discussed or distinguished in Appendix "C" at the very least suggest

that this area of civil rights jurisdiction has produced questions worthy of the attention of this Court, and Officer Mark Starling of the Columbus, Georgia Police Department respectfully suggests both consideration of these questions and the rendition of certain answers sustaining the original dismissal of the complaint. It would seem consistent with good federal policy and good common sense to require federal plaintiffs to link their claim to something more tangible than "due process" — something recognized by long practice in procedural matters or in the Bill of Rights. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1974) suggests that the protection to "life" afforded by the Fourteenth Amendment does not create any special area of federal constitutional protections against wrongful deaths, but only considers the term "life" significant insofar as it relates to protections to "liberty" or "property": "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." If "life" itself is not within the scope of federal protection, how then can various bodily parts be within such protection? Whether or not the Fourteenth Amendment and 42 U.S.C. §1983 contemplate any federal tort law for the infliction of death itself need not occupy the attention of the Court in this case, for the Plaintiff only alleges assault and battery resulting in personal injuries. In light of these facts and in view of the rule in *Paul v. Davis*, the classification of various rights by the distinguished authorities cited in *Johnson v. Bradstreet Company*, 87 Ga. 79, 81, 13 S.E. 250, 251 (1891) becomes significant:

> "At common law, absolute personal rights were divided into personal security, personal liberty, and private property. The right of personal security was subdivided into protection to life, limb, body, health, and reputation. 3 Blackst. Com. 119. If the right to personal security includes reputation, then reputation is a part of the person, and an injury to the reputation is an injury to the person. Under the head of 'security in person,' Cooley includes the right to life, immunity from attacks and injuries, and to reputation. Cooley on Torts (2d ed.), 23, 24. See, also, Pollock on the Law of Torts, *7. Bouvier classes among absolute injuries to the person, batteries, injuries to health, slander, libel, and malicious prosecutions. 1 Bouv.L.Dic. (6th ed.) 636."

Accordingly, the writ of certiorari should issue, the Court of Appeals should be reversed, and the District Court should be sustained under the authority of *Paul v. Davis* which excludes injury to reputation from the liberty or property interests protected by the Due Process Clause and under the common law which places libel and slander in the same category of personal injuries as assault and battery and which categorizes these personal interests under a different heading than those separate interests defined as "personal liberty" or "private property."

Respectfully submitted, this ____ day of June, 1980.

Eugene Hardwick Polleys, Jr.
Associate City Attorney
P. O. Box 1340
Columbus, Georgia 31993
Attorney for Petitioner
(404) 324-7711 Extension 453

CERTIFICATE OF SERVICE

I certify that I have caused to be served the necessary copies of this petition on Donald M. Samson of Moore & Worthington, Attorney for Respondent, 908 Second Avenue, Columbus, Georgia, 31901, by causing the printer to place said copies in the United States mail, postage prepaid.

This ____ day of June, 1980.

Eugene Hardwick Polleys, Jr.

APPENDIX A

JUDGMENTS, OPINIONS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICE OF THE CLERK

March 26, 1980

TO ALL PARTIES LISTED BELOW:

NO. 79-2778 — WILLIAM E. BEARD, JR., Etc., -vs-
M. STARLING,

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

/s/ SARAH L. HOLMES
Deputy Clerk

cc: Mr. Donald M. Samson
Mr. Eugene Hardwick Polleys, Jr.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1979

No. 79-2778
Summary Calendar

D.C. Docket No. CA 78-193-COL

WILLIAM E. BEARD, JR.,
and through his next friend and father
William E. Beard, Sr.,
Plaintiff-Appellant,

versus

M. STARLING,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

---

Before GEE, RUBIN and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

FEBRUARY 29, 1980

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Number and Title Omitted)

Summary Calendar*

February 29, 1980

Before GEE, RUBIN and POLITZ, Circuit Judges.

PER CURIAM:

William Beard, Jr. appeals the dismissal of his 42 U.S.C. §1983 claim against M. Starling, a Columbus, Georgia police officer for willfully beating him during the course of an arrest. The trial judge granted the defendant's motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), holding that Beard's claim failed to state a due process claim under §1983.

The complaint states that Officer Starling stopped Beard for a traffic violation. It alleges that, upon Beard's refusal to blow into the officer's hat, Starling shoved Beard against the police car and struck him, wrestled him to the ground, handcuffed him to a tree and beat him with a night stick. Beard contends that these acts violated his Fourteenth Amendment due process rights.

The alleged facts give rise to a §1983 cause of action under our holding in Hamilton v. Chaffin, 506 F.2d 904 (5th Cir. 1975), which stated:

---

* Fed.R.App.P. 34(a); 5 Cir. F. 18.

> Plaintiff asserted a claim cognizable under 42 U.S.C. §1983 by alleging that the defendants, while acting under color of state law, used excessive force in apprehending and detaining young Yates. The use of excessive force constitutes a violation of the Fourteenth Amendment right to due process, and, as such, is actionable under Section 1983.

Id. at 909.

The recent decisions of Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), and Baker v. McCollan, ____ U.S. ____, 99 S.Ct. 2689, ____ L.Ed.2d ____ (1979), do not alter the holding in *Hamilton*. These cases only reinforce the proposition that, in a §1983 action, a plaintiff must first point to the violation of a specific constitutional right. That threshold requirement has been met here by the allegation of excessive force constituting a violation of due process.

Of course, we intimate no opinion that the allegations can be proved, or even that summary judgment may or may not eventually be permissible. We hold simply that dismissal on the bare bones of notice pleading was not warranted.

For the above reasons, we REVERSE and REMAND for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

WILLIAM E. BEARD, JR., BY AND
THROUGH HIS NEXT FRIEND AND FATHER,
WILLIAM E. BEARD, SR.,
Plaintiff,

versus CA No. 78-193-COL

M. STARLING,
Defendant.

Filed: June 18, 1979

JUDGMENT

Pursuant to the Court's Memorandum and Order filed on June 18, 1979, and for the reasons contained therein, Defendant's Motion for judgment on the pleadings is sustained and the Plaintiff's complaint is dismissed without prejudice to his right to reassert his claim in an appropriate state forum if he chooses to do so.

Judgment is therefore entered in favor of the defendant.

At Columbus, Georgia this 18th day of June, 1979.

WALTER F. DOYLE, CLERK

/s/ Jonnie L. Adams
Jonnie L. Adams, Deputy Clerk

I certify that I have this date
mailed a copy thereof to all
counsel of record.

This 18th day of June, 1979.

/s/ Jonnie L. Adams
Jonnie L. Adams

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

(Number and Title Omitted)

Filed: June 18, 1979

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

In the action above identified the Plaintiff invokes 42 U.S.C. §1983 and the Fourteenth Amendment to the Constitution and he refers to being deprived of rights, privileges and immunities under color of state law.

The pleadings show that the Plaintiff was operating a motor vehicle on the streets in Columbus, Georgia, and was arrested by the Defendant for a violation of the traffic ordinances in the city, the Defendant being a traffic officer of the city. During the course of questioning and examination by the officer a scuffle ensued and blows were exchanged between the Plaintiff and Defendant, as a result of which the Plaintiff claims general and punitive damages of the Defendant, and the Defendant by counterclaim seeks general and punitive damages of the Plaintiff.

The Defendant has filed a motion for judgment on the pleadings, contending that the civil rights statute referred to was not intended to confer jurisdiction in this Court in a situation of this nature.

It is the Court's view that the Plaintiff's complaint does not set out a due process claim cognizable under the civil rights statute. This is simply an assault and battery claim which should be prosecuted under the appropriate state statute in a state court. Section 1983 was not intended to pre-empt state laws in their proper role of vindicating what are essentially state-guaranteed rights. We do not have here a claim of illegal arrest, and assault claims, standing alone, will not ordinarily receive the attention of the Federal Courts.

The federal claim here asserted is too nebulous to rise to the constitutional proportions necessary to give this Court jurisdiction. Accordingly, the Defendant's

motion for judgment on the pleadings is sustained and the Plaintiff's complaint is dismissed without prejudice to his right to reassert his claim in an appropriate state forum if he chooses to do so.

IT IS SO ORDERED this 18th day of June, 1979.

J. ROBERT ELLIOTT
UNITED STATES DISTRICT
JUDGE

APPENDIX B

Section 1 of the Fourteenth Amendment
to the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

---

28 U.S.C. §1343(3) Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

APPENDIX C

Civil Rights Cases Involving the Use of Force Relied upon by Respondent before the Fifth Circuit Court of Appeals—Discussed and Distinguished by Petitioner.

1.

Morgan v. Lambiak, 368 F.2d 338 (Tenth Circuit 1966): There is no indication in this case that the defendants made an issue of federal jurisdiction, but there is every indication that force constituted an integral part of the arrest and that either the plaintiff or the court apparently had in mind a Fourth Amendment violation: "The appellants in the presence of the assembled crowd used their night sticks to dislodge the appellee from his property and take him to the city jail." 368 F.2d 338, 340.

2.

Jenkins v. Averett, 424 F.2d 1228 (Fourth Circuit 1970): The court considered the matter to be a Fourth Amendment violation: "It should not be forgotten that the Fourth Amendment expressly declares 'the right of the people to be secure in their *persons* . . . against unreasonable searches and seizures' ". 424 F.2d 1228, 1232.

3.

Johnson v. Glick, 481 F.2d 1028 (Second Circuit 1974): The plaintiff in this case invoked the Eighth Amendment and on pages 1032 and 1033 the opinion discusses *Rochin v. California*, 342 U.S. 165 (1952) which in-

volved a "stomach pumping" process used for obtaining evidence, which the court said constituted conduct which "shocks the conscience" and which obviously would involve Fourth Amendment considerations because of the purpose of the shocking conduct. Particularly relevant to the case at bar is the observation on page 1033 that "the constitutional protection is nowhere nearly as extensive as that afforded by the common law tort action for battery."

4.

Henry v. Cagle, 482 F.2d 137 (Sixth Circuit 1973): The issue in this case was whether the acts occurred *under color of state law* and defendants made no issue of *federal jurisdiction* nor did the court consider such an issue: "The case was decided principally on the question of whether or not the constable at the time was investigating a crime within his official orbit."

5.

Gregory v. Thompson, 500 F.2d 59 (Ninth Circuit 1974): As indicated by a reading of this opinion on page 62, it apparently concludes that assault and battery constitutes a valid claim for a number of reasons unrelated to the case at bar. The defendant justice of the peace in evicting the plaintiff from the courtroom acted under color of state law and apparently thereby denied him some right of access to the court and thus the assault and battery could be said to rise to constitutional proportions. The opinion cites *Cohen v. Norris,* 300 F.2d 24 (Ninth Circuit 1962) and *Jenkins v. Averett,* both of which

involve Fourth Amendment claims and then the opinion goes on to say that "the right violated by an assault has been described as the right to be secure in one's person and is grounded in the due process clause of the Fourteenth Amendment." However, the opinion apparently confuses or has in mind or means the Fourth Amendment as *incorporated* by the Fourteenth Amendment because it is the Fourth Amendment, *not* the Fourteenth Amendment, which contains this language and, of course, the full phraseology of the Fourth Amendment is the "right of the people to be secure in their persons . . . *against unreasonable searches and seizures*", not any right to be free from the common law tort of assault and battery which was at the time of the ratification of the amendment and still is a *state*, not a *federal*, tort. Then the opinion directs our attention to *Curtis v. Everette*, 489 F.2d 516 (Third Circuit 1973) and *Johnson v. Glick*, both of which invoke the cruel and unusual punishment clause of the Eighth Amendment.

6.

Bellows v. Dainack, 555 F.2d 1105 (Second Circuit 1977): This is another Fourth Amendment case: "The plaintiff contended that the defendants deprived him of his constitutional rights by subjecting him to undue physical force at the time of his arrest and shortly thereafter by detaining him illegally in their patrol car." 555 F.2d 1105, 1106. The distinction between a pure assault claim and an assault claim which is coupled to a Fourth Amendment claim is illustrated in footnote 1 which cites *Monroe v. Pape*, 365 U.S. 167 (1961) and *Paul*

v. Davis, and this footnote at page 1107 makes the distinction in its concluding sentence: "Where, as here, the plaintiff alleges an illegal arrest and detention, the guarantee of 'liberty' under the Due Process Clause is clearly involved."

7.

Davis v. Murphy, 559 F.2d 1098 (Seventh Circuit 1977): The plaintiffs invoke the Fourth and the Eighth and the Thirteenth Amendments, the latter of which was allegedly violated by inflicting upon them punishments because of their Afro-American ancestry. In addition, the court considered that the plaintiffs could invoke the procedural due process guarantee of the Fourteenth Amendment because of the false charges allegedly made against them, a matter which is not involved in the case at bar: "As shown in our brief summary of the amended complaint, plaintiffs asserted that the assaults inflicted upon them were excessive, that their arrests were unlawful, and that defendants maliciously attempted to have false charges issued against them, all in specific violation of the Fourth and Eighth Amendments, as incorporated in the Fourteenth, as well as the procedural due process guarantee embodied in the Fourteenth Amendment itself." 559 F.2d 1098, 1102.

8.

Landrum v. Moats, 576 F.2d 1320 (Eighth Circuit 1978): The plaintiff's decedent was shot and killed while flee-

ing arrest and a string of constitutional violations was alleged: "In the present case plaintiff-appellant asserts violations of the fourth, fifth, sixth, eighth, and fourteenth amendment rights." 576 F.2d 1320, 1324. "The right to life is fundamental and is protected against unreasonable or unlawful taking by the procedural due process safeguards of the fifth and fourteenth amendments." 576 F.2d 1320, 1325. This latter assertion by the court might be questioned under the assertion made in the dissenting opinion in *Jones v. Hildebrant.*

Supreme Court, U. S.
FILED
OCT 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-2032

MARK STARLING,

PETITIONER,

versus

WILLIAM E. BEARD, JR.,
and through his next friend and father,
WILLIAM E. BEARD, SR.,

RESPONDENT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Donald M. Samson
MOORE & WORTHINGTON, P.C.
908 Second Avenue
Columbus, Georgia
31901
Attorney for Respondent

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STATEMENT OF ISSUE

The sole issue involved in this appeal is "Does plaintiff-respondent's complaint containing allegations of deprivation of due process of law as a result of excessive force used by a police officer in effecting an arrest state a cause of action under 42 U.S.C. 1983?"

STATEMENT OF THE CASE

Plaintiff, WILLIAM E. BEARD, JR'S., complaint states that on November 13, 1978, he was stopped for a traffic offense in the city of Columbus, Georgia by officer M. Starling, a member of the Columbus police department acting at that time as an on duty officer. The petition goes further to allege that during the course of the stop officer Starling attacked the plaintiff, wrestled him to the ground, handcuffed him to a small tree, and while plaintiff lay helpless on his back defendant raised up over him and wilfully and maliciously struck plaintiff with a blow from his fist in plaintiff's face. It is further alleged that defendant then returned to his patrol car, retrieved his night stick, returned to where plaintiff lay semi-conscious, still handcuffed to the tree, and struck plaintiff with his night stick. Plaintiff's complaint then states that these acts of defendant caused plaintiff to suffer great bodily pain and injury and mental anguish and were done

while defendant was acting under color of law and with a specific intent to deprive plaintiff of his constitutional rights to due process to be free from excessive force while being arrested as secured by the 14th amendment to the United States Constitution, federal jurisdiction being invoked under 42 U.S.C. 1983 and 28 U.S.C. 1343 (3).

ARGUMENT AND AUTHORITY

The sole question involved in this appeal is whether an allegation of excessive force used by a police officer in effecting an arrest states a cause of action under 42 U.S.C. 1983. Respondent claims that an allegation of excessive force used in effectuating an arrest constitutes a deprivation of the constitutional guarantee to due process due process including the right to be arrested in an orderly fashion free from excessive force by the arresting officer. This principle deeply embedded in our constitutional right to trial by jury was an answer to earleir times when justice was dispatched on the spot and punishment in the form of on-the-spot beating, shooting or lynching constituted a form of justice. This country progressed past this stage when the Bill of Rights was enacted and this Court has recognized the constitutional right of an individual to be free from excessive force used by law enforcement officials during an arrest. Screws vs. United States, 655, S.Ct. 1031, 1038 (1945).

In Screws (supra) this Court ruled that an element to due process is the right to a trial in a criminal case, this trial being in a Court of law and not a trial by ordeal. The facts in that case involved a young male who after being arrested on a warrant was beaten by three

law enforcement officers. The law enforcement officers were then prosecuted under 18 U.S.C. §52 which is the criminal counterpart to 42 U.S.C. 1983. The Court in holding that a constitutional right of the suspect has been violated by the law enforcement officers' use of excessive force stated:

> "Those who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him." Screws (supra at 1038).

Following the enunciation of this constitutional right in Screws, (supra), the federal courts have overwhelmingly held that an allegation of excessive force used in effecting an arrest states a cause of action under 42 U.S.C. 1983. Hamilton vs. Chaffin, 506 F.2d 904, 909 (CA5, 1975); Morgan vs. Lambiak, 368 F.2d 388 (CA10, 1966), "A person unlawfully beaten by an arresting officer is denied the right of due process of law; Jenkins vs. Averett, 424 F.2d 1288 (CA4, 1970), plaintiff subjected to reclkess use of excessive force by police officer, such arbitrary action constituting a constitutional violation;

Henry vs. Cagle, 482 F.2d 137 (CA6, 1973), where Constable used his official position so as to be able to commit a wholly unofficial assault, federal jurisdiction under 42 U.S.C. 1983 was proper; Gregory vs. Thompson, 500 F.2d 59 (CA9, 1974), "It is well established that §1983 provides a remedy for one who has been the victim of an assault and battery at the hands of a person acting under color of State law. ...The right violated by an assault has been described as the right to be secure in one's person, and is grounded in the due process clause of the Fourteenth Amendment; "Davis vs. Murphy, 559 F.2d 298 (CA7, 1977), "[t]he use of excessive force by police officers in effecting an arrest is well recognized ground for liability under 42 U.S.C. §1983" quoting with approval Clark vs. Ziedonis, 513 F.2d 79, 80 n. 1(CA7, 1975), and further holding that Paul vs. Davis, 96 S.Ct. 1155 (1976) does not bar this 1983 action; Bellows vs. Dainack, 555 F.2d 1105 (CA2, 1977), Rejects arguments of defendants that allegations of excessive force by law enforcement officers acting under color of State Law fail to claim for relief under 42 U.S.C. §1983 and that Paul vs. Davis, (supra) would not require control and require a contrary conclusion; Landrum vs. Moats, 576 F.2d 1320, 1327 (CA8, 1978); Use of excessive force by police officers acting under color of law establishes an action under §1983; Smith vs. Spina, 477 F.2d

1140, 1144 (CA3, 1973), though in dicta the Court states that plaintiff did not state a claim under 42 U.S.C. 1983 when he alleged an assault and battery by an officer acting under color of law, this dicta is based on deficiencies in the pleadings as stated in footnote 1 at page 1144 where the Court sanctions such actions when properly plead.

The Fifth Circuit from where this case originated has stated in Hamilton, (supra at 909),

> "Plaintiff asserted a claim cognizable under 42 U.S.C. §1983 by alleging that the defendant, while acting under color of state law, used excessive force in apprehending and detaining young Yates. The use of excessive force constituted a violation of the 14th amendment to due process, and, as such, is actionable under section 1983."

The facts of the case involved a 15 year old youth whom officers observed light and throw what was later determined to be a cherry bomb. The officers approached the youth and called for him to halt whereupon he dashed behind the hedge of a nearby residence. As the officers attempted to apprehend the youth he darted out from a bush colliding with one of the

officers causing both to tumble to the ground. When he was lifted up he was bleeding from the nose and mouth. He was immediately taken to the local jail and was booked, minutes later he was found dead in his cell having used his belt to hang himself. The petition alleged that the defendants applied excessive force during their apprehension and search of the youth. This Court's ruling, quoted above, stated that the issue of excessive force was clearly brought before the Court and stated a cause of action under 42 U.S.C. 1983.

In the same opinion that Court stated the creteria that must be considered to give rise to a constitutional deprivation of due process actionable under 42 U.S.C. 1983. Quoting with approval from the opinion of Judge Friendly in Johnson vs. Glick, (CA2) 481 F.2d 1028, cert. denied, 94 S.Ct. 462, (1974) that Court said:

> "In determining whether the constitutional line has been crossed a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that used, the extent of the injury inflicted and whether force was applied in a good faith method to maintain or restore discipline or

> maliciously and sadistically for the very purpose of causing harm."

A reading of plaintiff's complaint (R-4,5) shows that the allegations in the complaint clearly meet the criteria stated in Johnson, (supra). The allegations in plaintiff's complaint show that there was no need for the application of force by defendant, that whatever force was used by defendant was excessive, that plaintiff suffered injuries including damage to his teeth and mouth as a result of defendant's use of excessive force and that the force was not applied in a good faith effort to maintain or restore discipline but was applied maliciously and sadistically for the very purpose of causing harm. This last point clearly indicated in paragraph 7 of plaintiff's complaint where it is alleged that:

> "...while plaintiff lay on his back making no attempt to move, defendant rose over plaintiff and wilfully and maliciously struck plaintiff with an overhand blow to the face which caused blood to flow freely from plaintiff's mouth. Thereupon defendant returned to his patrol car, picked up his night stick, returned to where plaintiff lay semi-conscious, still hand cuffed to the

tree, and wilfully and maliciously struck plaintiff with his night stick." (R-5)

The question remaining to resolve the issue presented is whether there is authority which requires this Court to change the existing law. Paul vs. Davis, 96 S.Ct. 1155, (1976), which is relied upon by Petitioner stands for the proposition that a state tort action does not necessarily become a constitutional deprivation merely because it is committed by a state official acting under color of law. In Paul, (supra) plaintiff's name and photograph appeared on a flyer which was captioned "Active Shoplifters" and was distributed among local merchants by the chiefs of police of Louisville, Kentucky and Jefferson County, Kentucky. This Court in an opinion delivered by Justice Rehnquist ruled that a defamation by a state official acting under color of law did not deprive the plaintiff of any rights secured by the constitution of the United States and though the defamation may give rise to a tort action under state law there could be no cause of action invoking federal jurisdiction under 42 U.S.C. 1983 since there was no deprivation of a federal constitutional right.

This same line of reasoning was followed in the recent case Baker vs. McCollan, 99 S.Ct. 2698, (1979) in which this Court ruled that to constitute a

violation of ones civil rights, the plaintiff must be able to point to the specific constitutional guarantee which he has been deprived of by persons acting under color of state law. Baker, (supra) involved a plaintiff who was arrested pursuant to a valid warrant bearing his name and detained in jail for 3 days despite his protests of mistaken identity. Upon ascertaining that it was plaintiff's brother, who had previously been arrested and used plaintiff's driver's license for identification, and not plaintiff who should have been arrested, plaintiff was released. The court ruled that since the arrest was made pursuant to a valid warrant there had been no violation of his constitutional rights, his only cause of action possibly being a state tort claim for false imprisonment. It is clear that both Paul, (supra) and Baker, (supra) hold that a tort claim does not give rise to a action under 42 U.S.C. 1983 merely because the act giving rise to the claim is committed by an official acting under color of state law. To constitute a claim under 42 U.S.C. 1983 there must be an allegation that a constitutional right of the plaintiff was violated by persons acting under color of law. Paul, (supra at 1160), Baker, (supra at 2692). This does not mean that a cause of action based upon a constitutional deprivation such as the case under consideration should fail merely because the acts

which gave rise to the constitutional deprivation might also give rise to state tort calim. The fallacy of this reasoning can be demonstrated by reference to the situation of an illegal arrest and detention. An illegal arrest and detention is a constitutional deprivation cognizable under 42 U.S.C. 1983, Monroe vs. Pape, 81 S.Ct. 473 (1961), while at the same time constituting a cause of action for false arrest and false imprisonment under state tort law.

CONCLUSION

The right to be free from excessive force by officers in effecting an arrest is a constitutional guarantee and it has been so held by this Court. Accordingly the federal courts are nearly unanimous in holding that allegations of excessive force used by law officers in effecting an arrest state a cause of action under 42 U.S.C. 1983. This is well established law and there is no need for this Court to issue the requested writ.

Respectfully submitted this 24th day of October, 1980.

MOORE & WORTHINGTON, P.C.

Donald M. Samson
908 Second Avenue
Columbus, Georgia 31901
Attorney for Respondent

(404) 324-5606

CERTIFICATE OF SERVICE

I, the undersigned of counsel for the Respondent, do hereby certify that I have this date served the Petitioner with copies of the foregoing and attached Brief by mailing same to Hon. Eugene Hardwick Polleys, Jr., attorney of record for the Petitioner at P.O. Box 1340, Columbus, Georgia 31993.

This 24th day of October, 1980.

Attorney for
Respondent